

Electronics Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act (UETA)

The 2nd Annual Spring Meeting

OF THE BUSINESS LAW SECTION
AND THE INTELLECTUAL PROPERTY SECTION
OF THE STATE BAR OF CALIFORNIA
APRIL 27-29, 2001, HILTON LA JOLLA, TORREY PINES

By Roland E. Brandel
Morrison & Foerster
San Francisco, California

ELECTRONICS SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Roland E. Brandel
Morrison & Foerster
San Francisco, California

BEFORE THE
STATE BAR OF CALIFORNIA
BUSINESS LAW SECTION
SECOND ANNUAL SPRING MEETING

PROGRAM ON

CYBERSPACE ODYSSEY 2001 - A JOURNEY THROUGH THE HOTTEST ISSUES IN INTERNET
PRACTICE

April 28, 2001

ELECTRONICS SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

I. An overview:

- A. UETA became effective in California on January 1, 2000
- B. Electronic Signatures in Global and National Commerce Act (E-sign) became effective on October 1, 2000
- C. Both enable e-commerce, as opposed to prescribing limiting regimes
- D. For many industries, e-commerce is very important
 - 1. Contract formation
 - a. speed
 - b. retention
 - 2. Disclosures, Notices, Statements, Retention
 - a. speed
 - b. utility to recipient

c. access by recipient

d. cost savings

i. Can be enormous in sectors where periodic communication is mandated by law

ii. Some companies are aggressively seeking conversions

II. Relationship of UETA to E-sign:

A. UETA drafting was rushed; its goals were:

1. Encourage e-commerce

2. Fend off bad legislation - make uniform

B. Approval by NCCUSL - end of July, 1999

C. S 820, California's version of the UETA was passed by the legislature on September 9, 1999 and signed by the Governor on September 16, 1999

III. In 1999, Congress had several bills pending

A. The primary focus was on:

1. S 761 introduced on March 25, 1999

2. HR 1714 introduced on May 6, 1999

B. Slow movement; viewed as transitional legislation until September 16, 1999

C. Big shift in Congressional attitude - protect uniformity and substance, avoid political pressure from states - major incursion into sphere of states- but note the UCC in 1950's

D. With the President threatening a veto

1. November 9, 1999 - HR 1714 passed the House by 356-66,

2. November 19, 1999 - S 761 passed the Senate by a unanimous written consent

3. Very different bills

E. E-sign (S 761) is the House Bill with the Senate number

1. June 14, passed the House 426-4

2. June 16, passed the Senate 87-0

IV. Coverage:

A. With Federal E-sign, arguably don't need state legislation, except for §103 exceptions

B. Why "arguably" - see §101(a) - covers only a "transaction in or affecting interstate or foreign commerce"

C. However, even if a uniform UETA were adopted nationwide, we would need S 761 for "transactions" controlled by Federal requirements.

D. Does E-sign cover governmental transactions?

1. cf. definitions of "transaction" in E-sign §106(13) and UETA §2(16)
2. public policy should encourage inclusion of governmental transactions

V. Core principles:

A. §101(a)(1), (2) - the base rule - legal equivalency of the electronic versions of paper documents and written signatures with the paper versions. The rest of statute consists of prerequisites, exclusions, preemption rules, and exceptions

1. §101(a)(1) covers notices, disclosures, required statements, retention
2. §101(a)(2) covers contract formation

B. Important definitions

1. §106(5) - electronic signature - "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."
2. §106(7) - information
3. §106(9) -- record
4. §106(4) -- electronic record

C. What it is not

1. It is not "digital signature" legislation
 - a. Much broader - e.g. voice/fax/cable
 - b. Even in Internet world, digital signature can have two meanings:
 - i. Sent digitally -- e.g., simple name on e-mail
 - ii. hash creation, produced by PKI technology to ensure message integrity
2. It is not "digital certificate" legislation.
 - a. E-sign creates an equivalency rule for electronic messages
 - b. Digital certificates are attached to electronic messages and are a statement by a third party of the identity of the sender of the electronic message. Cf. A notary function.
3. E-sign contains no attribution (non-repudiation) principle.

D. For an electronic message to have a high degree of integrity, confidentiality and assurance re identity of the sender, one may use separate services. For example:

1. encryption of message for confidentiality
2. digital signature for message integrity
3. digital certificate for identifying the source or author of message

E. §101(c) -- consumer protection features

1. May not cover contract formation, but only "information" (notices, disclosures).
Note the fears of consumer advocates. Be careful of this issue.
2. §101(c)(3) -- failure of one aspect of the consent requirements (§101(c)(1)(C)(ii)) won't affect enforceability of a contract.

VI. Preemption Principles

- A. Note the strong preemption principle in §101(a).
- B. The Act sets forth principles re "Exemption to Preemption."
- C. §102(a)(1) -- a special rule for a truly uniform UETA
 1. UETA may have provisions inconsistent with E-sign and yet may "modify, limit or supersede" provisions of E-sign
 2. Treatment of exclusions specifically permitted by UETA
- D. §102(a)(2) -- rules for all other state laws, including non-uniform versions of UETA
 1. State provisions must be "consistent"
 2. Must not favor specific technologies
 3. If enacted, post-June 30, 2000, must refer to the E-sign Act
 4. Major interpretative differences in how §102 should be applied

VII. Prerequisites to use of E-sign

- A. None for business parties (cf. §101(b)(2)); but see Cal. Civ. Code § 1633.5
- B. Query whether 101(c) consent is required as a prerequisite to contract formation with consumers
- C. In contrast, a detailed regime of disclosures, prerequisites and consent exists before electronic disclosures and records may be substituted for paper disclosures for consumers - §101(c)(1).
 1. Does not affect requirements other than the media -- §101(c)(2)(A); §101(f)
 2. Prior consent is specifically recognized. Does it require a specific permissive rule of law or is absence of a rule sufficient? See §101(c)(5)
- D. Note the Congressional concern re the wisdom of the consumer consent provisions
 1. § 104(d)(1) -- delegation of authority to federal regulatory agencies (not state agencies or self-regulatory organizations) to nullify selectively the consumer disclosures provisions.
 2. By June 30, 2001, the FTC and the Secretary of Commerce are to report to Congress with an evaluation of § 101(c)(i)(C)(ii)

VIII. Retention of Records

- A. §§101(d), (e) -- requires accuracy and accessibility
- B. General rule specifically confirmed for checks -- §101(d)(4)

C. Equivalency protection fails if §101(d)(1) requirements are not met

IX. Notarization v. digital certificates -- major policy debates, but they are avoided by E-sign (§101(g)) and UETA (Cal. § 1633.11).

X. Insurance industry -- me too -- §101(i)

XI. Specific Exceptions -- §103

A. Picked up from UETA -- §103(a)

B. Court filings and health and safety issues -- §103(b)

XII. Applicability to Federal and State Governments and Self Regulatory Organizations

A. Re filings -- major flexibility including the ability to continue to require paper filings -- §104(a) (note absence of limitation provided by §104(c)(1)).

B. Re Existing Rulemaking Authority -- §104(b)

1. §104(b)(1) seems to permit broad continued interpretative authority

2. But, §104(b)(2) is very limiting. It requires an agency to

a. Be consistent with §101

b. Impose no additional requirements

c. Articulate regulatory findings

d. Favor no specific technology

3. Requiring the private sector to retain paper records is prohibited, with limited exceptions. §104(b)(3)(B)

XIII. Transferable Records

A. A very broad concept under the "standard" version of UETA, which would permit electronic versions of notes and documents of title.

B. The Transferable Records provisions do not appear in the Calif. UETA

C. The Transferable Records provisions in E-sign cover only notes secured by real property. § 201

XIV. Effective Dates §107

A. Record retention - 3/1/01

B. Retention rulemaking in progress - 6/1/01

C. Student loans - no later than 6/30/01

D. Guaranteed and insured loans - 6/30/01

XV. Some California Issues

A. Calif. UETA

1. consent requirements - Civ. Code §1633.5(b)

2. exceptions - Civ. Code §1633.3(b)(c) lists more than 70 exceptions to coverage, but Civ. Code §1633.3(f) provides the resolution - coverage by E-sign
3. attribution principle - Civ. Code §1633.9
4. a true UETA bill for California, SB 97, was introduced on January 18, 2001

B. Broker-Dealer Communications - Civ. Code §1633.

XVI. European and International Framework

A. Electronic Signatures Directive-Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

1. Current Status

- a. Directive became effective on January 19, 2000
- b. Member States must implement Directive before July 19, 2001

2. General Considerations

a. Background

- i. Divergent rules regarding electronic signatures emerged in Member States
- ii. Commission feared barrier to electronic commerce in internal market and recognized need for harmonization

b. Goals of the Directive

- i. Promote confidence in electronic commerce; facilitate use of electronic signatures
- ii. Strike balance between business and consumer needs
- iii. Establish clear legal framework regarding
 - (a) electronic signatures
 - (b) certification-service-providers
- iv. Directive does not cover
 - (a) confidentiality/encryption
 - (b) contract formation and enforceability
- v. Remain open to technological developments

c. Core Principles

- i. Technology neutral approach (in theory-in effect digital signatures using public-private-key encryption are favored because of "two-qualities-approach")
- ii. Voluntary accreditation schemes and certification-service-provider liability instead of

mandatory prior authorization of
certification-service-providers

iii. "Two-qualities-approach" (electronic signatures v.
advanced electronic signatures; signature creation
device v. secure signature creation device; certificate v.
qualified certificate) with differing legal consequences

3. Implications for US-EU Transactions

a. US certification-service-provider: for certificates to be recognized
provider must be accredited in EU, find provider that is established in
EU and guarantees the certificate, or benefit from bi- or multilateral
agreement

b. US merchant relying on electronic signature used by EU customer:
faces uncertainties resulting from "two-qualities-approach" and
absence of prior authorization (is signature advanced? is
signature-creation-device secure? is certificate qualified?); voluntary
accreditation may enhance reliability (is provider accredited?); work on
establishing standards that create a presumption that a system used is
trustworthy and that a signature-creation-device is secure is under way

B. Directive on electronic commerce-Directive 2000/31/EC of the European Parliament and of the
Council of 8 June 2000 on certain legal aspects of information society services, in particular
electronic commerce, in the Internal Market

1. Current Status

a. Directive became effective on July 17, 2000

b. The Directive has to be implemented by the Member States before
January 17, 2002

2. General Considerations

a. Background

i. Divergent rules regarding electronic commerce
emerged in Member States

ii. Uncertainty as to which national rules apply to
information society services

iii. Commission feared barrier to electronic commerce in
internal market and recognized need for harmonization
and clarification

b. Goals

i. Ensure legal certainty and enhance consumer
confidence regarding electronic commerce

ii. Striking balance between industry and consumer
interests

C. Draft UNCITRAL Model Law on Electronic Signatures

1. Current Status

a. UNCITRAL Working Group on Electronic Commerce approved final version of the Model Law at its thirty-seventh session, held in Vienna from 18 to 29 September 2000

b. Draft Model Law and Guide to Enactment will be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001

2. General Considerations

a. Background and Goals

i. Complement UNCITRAL Model Law on Electronic Commerce

ii. Provide guidance to governmental and legislative authorities in the process of preparing legislation on electronic signatures

b. Core Principles

i. Principle of media-neutrality

ii. Extensive reliance on party autonomy (provisions may be varied by agreement)

iii. Deals only with electronic signatures/certification in the context of commercial transactions

iv. "Two-qualities-approach" (electronic signatures v. enhanced electronic signatures) was dropped, but only "reliable" electronic signatures have same effect as written signatures

An article entitled **The E-Sign Act: A Federal Foundation for E-Commerce** by Roland Brandel and Veronica McGregor is available at:

<http://www.mofo.com/mofocgi/gendisplaylong?pubs,0553ESIGN1000,MMEDIA,I>

The statements and opinions in this article are those of the author(s) and not necessarily those of the State Bar of California, the Business Law Section or any government body. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.